89-567

No. 89-

IN THE

Supreme Court Of The United States

October Term, 1989

JIM SKINNER FORD, INC.,

Petitioner,

v.

JACK D. WARREN and JUANITA WARREN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

WALTER J. SEARS, III
Counsel of Record

MICHAEL R. PENNINGTON
Bradley, Arant, Rose & White
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 521-8000

JOHN M. GALESE
Galese & Moore
3058 Independence Drive
Birmingham, Alabama 35253
(205) 870-0663

52 pp

QUESTION PRESENTED FOR REVIEW

Given this Court's express holding in *Perry v. Thomas*, 482 U.S. 483, 490 (1987), that the Federal Arbitration Act provides "for the enforcement of arbitration agreements within the full reach of the Commerce Clause," and given that the Commerce Clause enables Congress to regulate intrastate sales of cars, can the Alabama Supreme Court refuse to enforce an arbitration agreement between a new car dealer and a buyer on the ground that the Act does not preempt state anti-arbitration law unless the parties actually "contemplated substantial interstate activity"?

PARTIES TO THE PROCEEDINGS BELOW AND LISTING OF PARENT CORPORATIONS, SUBSIDIARIES AND AFFILIATES

Plaintiffs

Jack D. Warren
Juanita Warren

Defendants

Jim Skinner Ford, Inc.
Ford Motor Company
First Alabama Bank of Birmingham

Only Petitioner Jim Skinner Ford, Inc. and Respondents Jack D. Warren and Juanita Warren have a direct interest in the outcome of this Petition, since they were the only parties to the arbitration agreement at issue. Jim Skinner Ford, Inc. has no parent corporations, subsidiary corporations, or affiliated corporations.

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IN THE

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October Term, 1989

JIM SKINNER FORD, INC.,

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v.

JACK D. WARREN and JUANITA WARREN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

Petitioner Jim Skinner Ford, Inc. respectfully requests this Court to issue a writ of certiorari to review the judgment of the Alabama Supreme Court entered in this action on July 7, 1989.

Petitioner submits that the decision of the Court below may be summarily reversed on authority of *Perry v. Thomas,* 482 U.S. 483 (1987), and *Southland Corp. v. Keating,* 465 U.S. 1 (1984).

OPINIONS BELOW

The opinion of the Alabama Supreme Court below has not yet been reported and is set forth in the Appendix to this Petition. (App. at A-1-10). The opinion of the Circuit Court of St. Clair County, Alabama is unreported and is set forth in the Appendix to this Petition. (App. at A-11-13).

JURISDICTION

The opinion of the Alabama Supreme Court was filed on July 7, 1989. (App. at A-1-10). This Court has jurisdiction to consider this Petition pursuant to 28 U.S.C. §§ 1257(a).[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVES

The constitutional provisions and statutes involved are: The Commerce Clause of Art. 1, Sec. 8 of the United States Constitution; the Supremacy Clause of Art. VI of the United States Constitution; the Federal Arbitration Act, 9 U.S.C. § 1, et seq.; and the Alabama statute prohibiting specific enforcement of pre-dispute arbitration agreements, *Ala. Code* (1975) § 8-1-41(3). Both the Federal Arbitration Act and *Ala. Code* (1975) § 8-1-41 have been reproduced in the Appendix to this Petition (App. at A-28-34).

STATEMENT OF THE CASE

On May 27, 1987, Respondents Jack D. Warren and Juanita Warren purchased a new Ford automobile from Petitioner Jim Skinner Ford, Inc. The contract of sale contained the following arbitration clause:

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[1]This Court has held that judgments of state courts which refuse to enforce arbitration agreements sought to be enforced under 9 U.S.C. § 1, *et seq.*, are reviewable as final orders pursuant to 28 U.S.C. § 1257. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984).

F. The undersigned purchaser and Jim Skinner Ford, Inc. further agree as follows:

1. That the motor vehicle described in this sale document has been heretofore traveling in interstate commerce and has an impact upon interstate commerce.

2. That in the event any dispute(s) arise under the terms of this contract of sale (including but not limited to the terms of the agreement, the condition of the motor vehicle sold, the conformity of the motor vehicle sold to the contract, the representations, promises, undertakings or covenants made by Jim Skinner Ford, Inc. in connection with the sale of the motor vehicle, or otherwise dealing with the motor vehicle, any terms of financing in connection therewith, or any terms of any credit life and/or disability insurance purchased simultaneously herewith, or extended service or maintenance agreements), that Jim Skinner Ford, Inc. and the purchaser agree to submit such dispute(s) to binding arbitration pursuant to the provisions of 9 U.S.C. § 1, et seq. and according to the commercial rules of the American Arbitration Association then existing in Birmingham, Alabama.

On August 20, 1987, the Warrens filed suit in Alabama state court against Jim Skinner Ford, Ford Motor Company, and First Alabama Bank of Birmingham (the bank which financed the Warrens' purchase of the vehicle). The Warrens asserted claims for breach of contract, breach of warranty, and violation of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Magnuson-Moss Warranty Act"), 15 U.S.C. §§ 2301-12. Jim Skinner Ford immediately filed a motion to stay the action pending arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("the FAA"). The trial court granted the motion on October 29, 1987.

The Warrens then filed a motion to alter or amend the trial court's stay and order. At a February 11, 1988, hearing on this motion, counsel for the Warrens and counsel for Jim Skinner Ford stipulated in open court that the Warrens were

residents of St. Clair County, Alabama; that Jim Skinner Ford, Inc. was a Delaware corporation with its sole place of business in Jefferson County, Alabama; that the automobile at issue was manufactured outside the State of Alabama by Ford Motor Company, a corporation located in Detroit, Michigan; and that the automobile was delivered by Ford to Jim Skinner Ford for retail sale and was thereafter purchased by the Warrens from Jim Skinner in Alabama. (App. at A-13-15).[2]

On June 29, 1988, the trial court denied the Warrens' motion to alter or amend and affirmed its previous order staying the action pending arbitration. (App. at A-11). On July 5, 1988, the Warrens filed a petition for a writ of mandamus with the Alabama Supreme Court.

On July 7, 1989, the Alabama Supreme Court issued an opinion granting the writ of mandamus. (App. at A-1-10). The court recognized that the sole issue was whether the contract was one "involving interstate commerce" so as to bring it within the coverage of the FAA, 9 U.S.C. § 2, but concluded that the retail sale of a new automobile manufactured outside Alabama to an Alabama resident by an Alabama dealer incorporated in Delaware is not a "transaction involving interstate commerce" within the meaning of the FAA. (App. at A-1-5).

The Alabama Supreme Court sought to justify its position by stating:

> We hold that the appropriate standard for making this determination is set forth in a special opinion in *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F.2d 382 (2d Cir. 1961), *cert. denied,* 368 U.S. 817 (1961):

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[2]In its opinion below, the Alabama Supreme Court incorrectly stated that the parties had also stipulated that "all obligations anticipated from the sales contract were to be performed solely within the State of Alabama." (App. at A-1-10). As shown by the transcript of the February 11, 1988, hearing (App. at A-13-27), there was no such stipulation. Moreover, although the opinion below shows the purported stipulations in quotes, the language used by the Court to frame the stipulations was taken from the Warrens' brief below and not from the transcript of the hearing itself. (*See* App. at A-13-15).

> "[W]hether at the time [the parties] entered into [the contract] and accepted the arbitration clause, they *contemplated* substantial interstate activity."
>
> 287 F.2d at 387 (Lumbard, Chief Judge, concurring) (emphasis original).
>
> Therefore, the standard here applicable is *not* the "regulating standard" of "affecting interstate commerce"; rather the test for determining whether the transaction involves interstate commerce is a distinct standard unique to the application of the FAA . . . "

(App. at A-4) (emphasis in original) (citations omitted). In the instant case, the court held that Jim Skinner Ford and the Warrens had not actually contemplated substantial interstate activity at the time the car was purchased:

> The contract in the present case served to transfer title to an automobile, already located in Alabama, to a resident consumer. Even using the ["slightest nexus with interstate commerce"] standard . . . . , we must conclude that such a transaction does not have a sufficient nexus with interstate commerce activity to bring the contract within the FAA.

(App. at A-5). The court then reversed the order staying the action pending arbitration based upon the following principles of Alabama law:

> "The enforcement of predispute arbitration agreements, while approved in the federal court system . . . , is specifically prohibited by *Ala. Code* (1975) § 8-1-41(3).[3] This federal policy does not preempt the differing Alabama policy in the present case because an issue of purely state law is in question . . . . 'The public policy of this state . . .

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[3] *Ala. Code* (1975) § 8-1-41(3) provides that "An agreement to submit a controversy to arbitration . . . cannot be specifically enforced", whereas the FAA, 9 U.S.C. § 2, provides that arbitration agreements must be specifically enforced as a matter of federal substantive law. *See Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

holds void an agreement in advance to oust or defeat the jurisdiction of the courts. . . .'."

(App. at A-4) (*quoting Wells v. Mobile County Board of Realtors,* 387 So.2d 140, 144 (Ala. 1980)).

Petitioner herein seeks a writ of certiorari to the Alabama Supreme Court and a summary reversal of the ruling below.

REASONS FOR GRANTING THE WRIT

A. *This Case Represents Another Attempt By The Alabama Supreme Court To Limit The Application Of The FAA In Alabama In Disregard Of Congressional Intent And Of Prior Decisions Of This Court.*

This Court has recently observed Alabama's historical hostility toward arbitration and the FAA in *Ex parte Alabama Oxygen*, 433 So.2d 1158 (Ala. 1983), *vacated and remanded,* 465 U.S. 1016 (1984). There, the Alabama Supreme Court held that the FAA did not preempt state law; that the FAA applied only in federal courts; and that in any event the FAA "does not reach activity which merely 'affects' interstate commerce," but only activity that "has a substantial *effect* on that commerce." 433 So.2d at 1163 (emphasis in original). This Court summarily vacated these holdings and remanded *Ex parte Alabama Oxygen* for disposition in accordance with *Southland Corp. v. Keating,* 465 U.S. 1, 10-16 (1984) (holding that the FAA does preempt state law and that in enacting the FAA, "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.").

Having failed in its earlier attempt to limit the reach of the FAA in *Ex parte Alabama Oxygen,* the Alabama Supreme Court now holds that "the test for determining whether the transaction involves interstate commerce is a distinct standard *unique to the application of the FAA.*" (App. at A-4). (emphasis supplied). In other words, in the FAA Congress did not intend to use the full reach of its power to regulate interstate commerce, but only intended to enforce arbitration agreements in those contracts with respect to which the

parties actually "contemplated substantial interstate activity." This standard is virtually identical to the "substantial effect on commerce" standard rejected by this Court in *Ex parte Alabama Oxygen*, and it conflicts directly with decisions of this Court.

In *Southland Corp. v. Keating*, this Court held that the FAA is an exercise of "Congress' broad power to fashion substantive rules under the Commerce Clause." 465 U.S. at 10, 11. In *Perry v. Thomas*, 482 U.S. 483, 490 (1987), this Court held that the FAA is a statute of "general applicability" which "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." Congress itself, in passing the FAA, emphasized that the act "reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce." H. R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924). Thus, the decision below erects a substantial barrier to arbitration never intended by Congress or this Court.

B. *The Ruling Below Has Important Implications For The Public And For The Uniform Application Of Federal Law.*

If the Alabama Supreme Court's ruling is allowed to stand, the federal law of arbitration will be frustrated and ignored in the state courts of Alabama and in any other state that tries to revive the common law hostility toward arbitration. In fact, the Alabama Supreme Court is apparently not alone in purporting to limit the FAA to contracts as to which the parties specifically "contemplate substantial interstate activity." The court below relied upon *Burke County Public Schools Board of Education v. Shaver*, 303 N.C. 408, 279 S.E.2d 816, 822 (1981), which endorsed the same standard.[4] This standard conflicts not only with this Court's holdings in *Southland* and *Perry v. Thomas*, but also with decisions of several federal

[4]The North Carolina Supreme Court has continued to apply the *Burke* standard in subsequent cases. *See, e.g., Cahoon v. Ziman*, 298 S.E.2d 729, 730 (N.C. App. 1983), *review denied*, 301 S.E.2d 388 (N.C. 1983); *Paramore v. Inter-Regional Financial Leasing Co.*, 316 S.E.2d 90, 92 (N.C. 1984).

appellate courts which have held that the FAA extends to the full reach of Congress' power under the Commerce Clause.[5]

While the federal district courts in Alabama and any other state following the standard adopted below would apply the FAA in accordance with the broad principles announced by this Court, the trial courts of those states will now apply the FAA only if the parties contemplated substantial interstate activity in the performance of their contract. Thus, forum-shopping could well determine whether a party is entitled to assert his federal arbitration rights. Such a result is what Congress sought to avoid through the FAA. *Southland Corp. v. Keating,* 465 U.S. 1, 14-16 (1984); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 26, n.34 (1983).

In addition, the standard adopted below is purely subjective. It requires an analysis of the contracting parties' subjective intent — whether they contemplated substantial interstate activity — rather than the objective analysis of whether the contract evidences a transaction within the broad reach of the Commerce Clause. 9 U.S.C. § 2; *Perry v. Thomas,* 482 U.S. 483, 490 (1987). This subjective analysis poses a significant danger of drastically reducing the reach of the FAA and of defeating the congressional declaration of a "national policy favoring arbitration and withdrawing the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland,* 465 U.S. at 10.

The obvious factual disputes and difficulties inherent in such a subjective analysis also undermine the very policies arbitration is intended to promote — simpler, speedier, and less costly resolution of contract disputes. *See* H. R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924) (FAA is intended to reduce congestion in courts and to avoid "the costliness and

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[5]*See, e.g., Robert Lawrence Co. v. Devonshire Fabrics, Inc.,* 271 F.2d 402, 406 (2d Cir. 1959), *cert. dismissed,* 364 U.S. 801 (1960); *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America, Local 437,* 207 F.2d 450, 454 (3d Cir. 1953); *Snyder v. Smith,* 736 F.2d 409, 417-19 (7th Cir. 1984) (dicta), *cert. denied,* 469 U.S. 1037 (1984).

delays of litigation" through enforcement of arbitration agreements). *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 22, 29 (1983); *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) (accord).

C. *The Alabama Supreme Court's Holding That The Sale Of A New Car By A Dealer To A Purchaser Located Within The Same State Does Not Affect Interstate Commerce Conflicts With Numerous Federal Statutes That Regulate Such Sales.*

The power of Congress to regulate interstate commerce is "plenary," extending even to the regulation of a farmer's crop of wheat for his own personal consumption. *Wickard v. Filburn*, 317 U.S. 111 (1942). *Accord, Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984). Congress has "broad and sweeping" power under the Commerce Clause to regulate any activity that may affect interstate commerce, whether directly or indirectly. *Wickard v. Filburn*, 317 U.S. at 120-25; *Katzenback v. McClung*, 379 U.S. 294 (1964). Moreover, even if the transaction or activity of one individual has no impact on interstate commerce standing alone, that transaction or activity may nevertheless be regulated by Congress under its commerce power if the cumulative effect of others engaging in the same type of activity or transaction could have an impact upon interstate commerce. *Wickard v. Filburn*, 317 U.S. at 127-28.

There is perhaps no type of consumer transaction that triggers the applicability of more Congressional regulation under the Commerce Clause than a contract for the sale of a motor vehicle. For example, in the Motor Vehicle Information and Cost Savings Act (*i.e.*, the "Odometer Act"), 15 U.S.C. §§ 1981, *et seq.*, Congress found that "motor vehicles move in the current of interstate and foreign commerce or affect such commerce. . . ." 15 U.S.C. § 1981. In that Act, Congress prohibited false odometer readings or representations by any person selling a new or used automobile, with no limitation on whether the buyer and seller reside in the same or different states. 15 U.S.C. § 1981, *et seq.*

Similarly, under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.*, Congress has regulated the warranty obligations arising out of the typical sale of a car by an instate dealer to an instate buyer, such as the transaction in this case. 15 U.S.C. § 2301(1),(3),(5),(13),(14). The Act also authorizes the establishment of informal dispute settlement procedures that can apply to a car dealer and a buyer. 15 U.S.C. § 2310(a). Other examples of Congressional regulation of intrastate motor vehicle sales include the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381, *et seq.*; and the Consumer Credit Protection Act, 15 U.S.C. §§ 1601, *et seq.*

Of course, virtually every new car buyer would normally be expected to purchase his automobile from a dealership located in his own state. If Congress can reach into such a transaction and regulate odometer readings, warranty obligations and informal dispute settlement procedures, then Congress, in exercising the full reach of the Commerce Clause under the FAA, can surely render enforceable arbitration agreements entered into as part of the same transaction. Ironically, in this very case, the Warrens seek recovery under the Magnuson-Moss Warranty Act, but contend that Congress' exercise of its commerce power in the enactment of the FAA does not reach the contract of sale which forms the basis of their Magnuson-Moss claim.

After holding that Congress in the FAA did not intend to utilize the full reach of its Commerce Clause power, the Alabama Supreme Court then held that even if the FAA applied whenever there is the "slightest nexus with interstate commerce," the sale of an automobile by a dealer to a purchaser located within the same state "does not have a sufficient nexus with interstate commerce activity to bring the contract within the coverage of the FAA." (App. at A-5). Under that rationale, it logically follows that Congress did not have the Commerce Clause power to extend the application of the Odometer Act, the Magnuson-Moss Warranty Act, and the other federal statutes discussed above to automobile sales between dealers and purchasers where both are

located in the same state. Such a conclusion is bizarre, but it flows directly from the anti-arbitration stance of the court below.

CONCLUSION

For the reasons set forth above, this Court should grant a writ of certiorari to review the judgment of the Alabama Supreme Court on these important issues of federal and constitutional law. Petitioner respectfully submits that this matter may best be disposed of by summary reversal on the authority of *Perry v. Thomas,* 482 U.S. 483 (1987), and *Southland Corp. v. Keating,* 465 U.S. 1 (1984).

Respectfully Submitted,

Walter J. Sears, III
Counsel of Record

Michael R. Pennington

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 521-8000

John M. Galese

GALESE & MOORE
3058 Independence Drive
Birmingham, Alabama 35253
(205) 870-0663

APPENDIX

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1989

87-1179 Ex Parte Jack D. Warren and Juanita Warren
PETITION FOR WRIT OF MANDAMUS
(In Re: Jack D. Warren and Juanita Warren
v.
Jim Skinner Ford, Inc., a Corporation, et al.)
(CV-87-126)

PER CURIAM.

Jack D. Warren and Juanita Warren petitioned this Court for a writ of mandamus directed to the Honorable H. E. Holladay of the Circuit Court for St. Clair County, Alabama. The writ is due to be granted.

On May 27, 1987, the Warrens, residents of St. Clair County, purchased a vehicle from Jim Skinner Ford, Inc. ("Jim Skinner"), a corporation organized in the State of Delaware and having its sole place of business in Jefferson County, Alabama. The sale of the vehicle was solicited, transacted, and executed wholly within the State of Alabama. The sales contract contained an arbitration clause, which is set out here verbatim:

> "F. The undersigned purchaser and Jim Skinner Ford Inc. further agree as follows
>
> "1. That the motor vehicle described in this sale document has been heretofore traveling in interstate commerce and has an impact upon interstate commerce.
>
> "2. That in the event any dispute(s) under the terms of this contract of arise (including but not limited to the terms of the agreement, the condition of the motor vehicle sold, the conformity of the motor vehicle sold, to the contract, the representations, promises, undertakings or covenants made by Jim Skinner Ford, Inc., in connection with the sale of the motor vehicle, or otherwise dealing with the

> motor vehicle, any terms of financing in connection therewith, or any terms of any credit life and/or disability insurance purchased simultaneously herewith, or extended service or maintenance agreements), that Jim Skinner Ford Inc. and the purchaser agree to submit such dispute(s) to binding arbitration, pursuant to the provisions of 9 USC § 1, et seq. and according to the commercial rules of the American Arbitration Association then existing in Birmingham, Alabama."

After the sale, the Warrens experienced numerous problems with the vehicle and they filed a breach of contract and warranties action pursuant to state law and the Magnuson-Moss Warranty — Federal Trade Commision Improvement Act, 15 U.S.C. §§ 2301-12, in St. Clair Circuit Court, naming Jim Skinner, Ford Motor Company ("Ford"), and First Alabama Bank of Birmingham as defendants. Jim Skinner filed a motion to stay the action pending arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 through 4 (the "FAA"), which the trial court granted. The Warrens then filed a motion to alter or amend the court's order. Oral argument was heard on this motion on February 11, 1988, after which Ford filed a motion to stay the proceedings pending arbitration. The trial court on June 29, 1988, denied the Warrens' motion to alter or amend and affirmed its previous order staying the action pending arbitration. The Warrens, on July 5, 1988, filed their petition with this Court for a writ of mandamus.

During the February 11, 1988, hearing, the following facts were stipulated by the parties:

> "1. The Warrens are residents of St. Clair County, Alabama.
>
> "2. Jim Skinner is a Delaware Corporation with its sole and principal place of business in the State of Alabama.
>
> "3. The sale of the vehicle which is the subject of this action occurred within the State of Alabama.
>
> "4. The vehicle which is the subject of this action was previously owned by Jim Skinner and [was] sold

to the Warrens pursuant to a contract entered into and executed in the State of Alabama.

"5. All obligations anticipated from the sales contract were to be performed solely within the State of Alabama."

The threshold inquiry in the present case is whether the sale of a motor vehicle manufactured outside of Alabama to an Alabama resident, who is buying it as a consumer and not for commercial purposes, is a contract involving "interstate commerce," as that term is used in the Federal Arbitration Act, where the seller has its only place of business in Alabama, the vehicle is delivered to the buyer in Alabama, and all obligations arising out of the contract of sale are to be performed in Alabama.

Alabama employs a two-pronged test to determine whether the FAA applies to a transaction within the state. This standard was announced by Justice Maddox's dissenting opinion in *Ex parte Alabama Oxygen Co.*, 433 So.2d 1158 (Ala. 1983), and was later adopted by this Court at 452 So.2d 860 (Ala. 1984). That standard is that the FAA applies to a contract if: 1) the contact (sic) was one involving interstate commerce; and 2) the contract contained an arbitration agreement voluntarily entered into by the parties.

It is undisputed that there was an arbitration clause in the contract involved in this case; therefore, the only question is whether the contract was one involving interstate commerce. In discussing the commerce requirement of the FAA, this Court has stated:

> "The requirement of the FAA that an arbitration agreement 'involve commerce' has been construed very broadly so that the slightest nexus of the agreement with interstate commerce will bring the agreement within the ambit of the FAA."

Ex parte Costa & Head (Atrium), Ltd., 486 So.2d 1272, 1275 (Ala. 1986).

Although we note that the language quoted from *Ex parte Costa & Head* is very broad, we find, nonetheless, that, under the particular facts of this case, the transaction in question

does not involve interstate commerce, as contemplated by the FAA; and, therefore, we hold that the provisions of the federal legislation are not controlling.

We hold that the appropriate standard for making this determination is set forth in a special opinion in *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F.2d 382 (2d Cir. 1961), *cert. denied*, 368 U.S. 817 (1961):

> "[W]hether at the time [the parties] entered into [the contract] and accepted the arbitration clause, they *contemplated* substantial interstate activity."

287 F.2d at 387 (Lumbard, Chief Judge, concurring) (emphasis original). See, also, *Burke County Public Schools Board of Education v. Shaver*, 303 N.C. 408, 279 S.E.2d 816, 822 (1981) (applying the *Metro Industrial* test).

Therefore, the standard here applicable is *not* the "regulating standard" of "affecting interstate commerce"; rather the test for determining whether the transaction involves interstate commerce is a distinct standard unique to the application of the FAA. See *Burke, supra*, at 822 (footnote 11).

Applying the FAA standard to the facts of this case, we perforce must conclude that the parties did not contemplate substantial interstate activity. Indeed, the stipulation of fact precludes, beyond any doubt, a finding that *any* interstate commercial activity would arise from the retail sale of the automobile.

Having determined that the FAA does not apply in the present case, we must next look to state law to determine what effect should be given to the contractual provision calling for arbitration. The enforcement of predispute arbitration agreements, while approved in the federal court system (see *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987)), is specifically prohibited by Ala. Code 1975, § 8-1-41(3). This federal policy does not preempt the differing Alabama policy in the present case, because an issue of purely state law is in question. See *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986); see, also, *Riverfront Properties, LTD. v. Max Factor III*, 460 So.2d 948, 953 (Fla. 1984).

In discussing the policy behind Alabama's nonenforcement of predispute arbitration clauses, this Court has stated:

> "The public policy of this state is to encourage arbitration and amicable settlements of differences between parties; but public policy also holds void an agreement in advance to oust or defeat the jurisdiction of all courts, as to all differences between the parties."

Wells v. Mobile County Bd. of Realtors, 387 So.2d 140, 144 (Ala. 1980).

The contract in the present case served to transfer title to an automobile, already located in Alabama, to a resident consumer. Even using the broad interstate commerce standard found in *Ex parte Costa & Head,* we must conclude that such a transaction does not have a sufficient nexus with interstate commerce activity to bring the contract within the coverage of the FAA. Thus, we hold that, under the narrow factual context of this case, there is no basis for invoking the FAA, and the arbitration clause contained in the contract cannot be enforced under Alabama law. The writ of mandamus, therefore, is due to be granted.

WRIT OF MANDAMUS GRANTED.

Hornsby, C. J., and Jones, Almon, Shores, Houston, Steagall, and Kennedy, JJ., concur.

Maddox and Adams, JJ., dissent.

Ex parte Jack D. Warren and Juanita Warren

MADDOX, JUSTICE (Dissenting).

The majority finds that "under the particular facts of this case, the transaction in question does not involve interstate commerce, as contemplated by the FAA; and, therefore, the provisions of the federal legislation are not controlling." In my opinion, the question is not whether "interstate commerce" was involved — clearly it was, and the parties so

stated in the sales agreement;[1] the real question, however, is whether Congress intended to preempt the field where the contract containing an agreement to arbitrate is one involving the retail sale of an automobile. The majority is of the opinion that Congress did not intend to cover such a contract. I cannot come to that conclusion, because I cannot make a distinction between a contract to buy stock[2] and a contract to buy an automobile, and I find myself having to dissent once again, as I did in *Ex parte Alabama Oxygen Co.*, 433 So.2d 1158 (Ala. 1983). In short, I believe that this transaction sufficiently involves interstate commerce so as to be controlled by the Federal Arbitration Act; therefore, I must respectfully dissent, as I have before.

The issue addressed in this case is whether the sale of a motor vehicle by a Delaware corporation from its sole place of business which is in the State of Alabama, to consumer/residents of Alabama is a transaction controlled by the FAA.

Alabama employs a two-pronged test to determine whether the Act applies to transactions within the state. This standard was announced in my dissent in *Ex parte Alabama Oxygen Co.*, 433 So.2d 1158 (Ala. 1983), and later adopted by the Court at 452 So.2d 860 (Ala. 1984), after, of course, the Supreme Court of the United States had vacated our judgment and remanded the cause to this Court for further consideration in light of *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). That standard is:

1. That the contract was one involving interstate commerce; and

2. That the contract contained an arbitration agreement voluntarily entered into by the parties.

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[1]The sales agreement for the automobile itself states:

"F. The undersigned purchaser and Jim Skinner Ford Inc. further agree as follows

"1. That the motor vehicle described in this sale document has been heretofore traveling in interstate commerce and has an impact upon interstate commerce."

[2]Arbitration clauses contained in contracts involving stock purchases are enforceable. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987).

The Warrens first argue that the appropriate standard for determining what constitutes a "transaction involving interstate commerce" as contemplated in the Act is whether the contract is one in which substantial interstate activity was contemplated by the parties as they entered into the contract that included the arbitration clause. They cite in support of this contention the following cases: *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F.2d 382 (2d Cir. 1961), cert. denied, 368 U.S. 817 (1961); *Burke County Public Schools Bd. of Ed. v. Shaver Partnership*, 303 N.C. 408, 279 S.E.2d 816, 822 (1981); *Ex parte Alabama Oxygen Co.*, supra, at 1175.

The Warrens argue that substantial interstate activity was clearly not contemplated, because:

1. The contract was solicited and executed in the State of Alabama.

2. The vehicle was not shipped to Alabama from another state as part of the contract of sale, and all activity in the performance of the sales contract was anticipated to be performed in Alabama.

The Warrens concede that Jim Skinner acquired the vehicle from out-of-state, but argue that the contract contemplated a sale of a vehicle located on the lot.

Conversely, Jim Skinner urges the application of the test announced in *Ex parte Costa & Head (Atrium) Ltd.*, 486 So.2d 1272 (Ala. 1986), which is:

> "The requirement of the FAA that an arbitration agreement 'involve commerce' has been construed very broadly so that the slightest nexus of the agreement with interstate commerce will bring the agreement within the ambit of the FAA."

486 So.2d at 1275.

Jim Skinner cites *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238 (5th Cir. 1986), in support of the trial court's order. In *Mesa Operating*, the court held that citizens of different states engaged in the performance of contractual operations in one of those states are engaged in a contract under the Act. Jim Skinner points out

that the United States Congress has enacted laws that regulate the effects of the manufacture, distribution, financing, warranty, and sale of motor vehicles in interstate commerce, and it directs our attention to the following: the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 2051 et seq.; the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 et seq.; the Automobile Dealers Suits Against Manufacturers Act, 15 U.S.C. § 1221 et seq.; the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 et seq.; and the Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq.

The petitioners attempt to distinguish *Ex parte Costa & Head (Atrium) Ltd.* from the facts of the present case. They argue that in *Costa & Head*, 1) there existed a limited partnership with partners from several states; 2) one party to the contract had an out-of-state principal place of business and was obligated under the contract to perform work in this state; 3) out-of-state workmen were employed to perform the contract; 4) materials incorporated into the project in this state were manufactured and transported into this state from out-of-state as part of the actual performance of the contract. Also, in *Costa & Head,* petitioners contend, the transactions were all of a commercial nature between businessmen of equal bargaining strength, whereas in this case, petitioners argue, the purchasers are ordinary consumers contracting with a large corporation to purchase a consumer good for family use. I am not persuaded that Congress intended the application of the provisions of the Act to be determined on a case by case basis because of the bargaining power of the parties.

In *Costa & Head,* this Court held that the Act will be applied in regard to *any* agreement that has the "slightest nexus" with interstate commerce. Applying this standard, it is inconceivable to me that this particular contract did not meet that test. In fact, the parties expressly stated that it did in the contract itself. Unquestionably, the subject vehicle was not manufactured in Alabama, but was manufactured outside the state and shipped into the state for sale within the state.

I agree with Jim Skinner's assertion that motor vehicles have an inherent effect on interstate commerce, as exemplified by the great volume of federal legislation regarding motor vehicles. I am not persuaded by the Warrens' argument that all of the parties are residents of the State of Alabama and that that is the controlling factor. In the recent decision of *Ex parte McKinney*, 515 So.2d 693 (Ala. 1987), this Court held that Alabama resident citizens who purchased annuities from an Alabama stock brokerage firm and pursuant to that transaction signed agreements containing arbitration clauses were bound by those arbitration clauses.

I think the trial court ruled correctly. The Warrens present no evidence that they were fraudulently induced to enter into this agreement to arbitrate, nor is there any evidence that they were coerced or that they were ignorant of the provisions of the contract upon entering into it. In short, there is substantial evidence to support the judgment of the trial court that this arbitration agreement was voluntarily entered into. The majority is of the opinion that the public policy and statutory law of this state, which refuse to enforce pre-dispute agreements to arbitrate, should prevail. If there were no conflicting provisions of federal law, state policy and statutory law in this respect would have to be honored. In this case, the majority bottoms its decision upon a finding that this contract does not involve "interstate commerce." The decision cannot rest on this premise.[3] The automobile industry is one of the most highly regulated industries in the country. I believe Congress intended to make contracts for the retail sale of automobiles containing arbitration clauses subject to the provisions of the Act, and, there being no evidence to show that the agreement was not voluntarily entered into, I would not find it contrary to the public policy or statutory law of this state.

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[3]Logically extended, the result of this holding, that the retail sale of an automobile by a dealer who is a resident of this state to a resident of this state does not involve interstate commerce, would mean that the myriad of cases authorizing Alabama residents to sue out-of-state manufacturers and hale them into Alabama courts may need to be reexamined.

This court, *Ex parte Warrior Basin Gas Co.*, 512 So.2d 1364 (Ala. 1987), quoted from *Seaboard Coast Line R. R. v. Trailer Train Co.*, 690 F.2d 1343 (11th Cir. 1982), the statement that "[a] determination by a trial court of what was intended by the parties in their agreement is a question of fact, not to be disturbed by this court unless clearly erroneous."

I am of the opinion that Judge Holladay's findings of fact are not clearly erroneous and that he has correctly applied federal law as it relates to the subject contract. I would deny the writ of mandamus.

IN THE CIRCUIT COURT OF ST. CLAIR COUNTY
ALABAMA
SOUTHERN JUDICIAL DIVISION AT PELL CITY

JACK D. WARREN and JUANITA WARREN	*	
Plaintiffs	*	
vs.	*	Case No. CV87-126
JIM SKINNER FORD, INC., a corporation, FORD MOTOR COMPANY, a corporation, and FIRST ALABAMA BANK OF BIRMINGHAM, a corporation	*	
Defendants	*	

Re: Motion to Dismiss or in the Alternative to Stay — filed February 19, 1988
Motion for hearing on Motion to Reconsider — filed March 11, 1988
Motion for hearing on Motion to Reconsider — filed April 20, 1988
Defendant Jim Skinner's Motion for Ruling — filed June 24, 1988

ORDER

This Court has considered all of the above styled motions. This Court has previously conducted a hearing on Motion for Reconsideration of the court's order staying prosecution under the Federal Arbitration Act and has had the matter under advisement pending the filing of briefs and consideration thereof by this Court. This Court can see no reason for having any additional hearing with regard to Motion for Reconsideration. This Court has found ample authority, in the opinion of this Court, to substantiate the ruling heretofore entered by this Court on 10-29-87.

Therefore, be it ORDERED that Motion for Reconsideration is hereby denied and the Plaintiff and Defendant shall submit the matters to arbitration under the authority of the Federal Arbitration Act, 9 U.S.C. § 1.

Dated this the 29th day of June, 1988

/s/ H. E. Holladay

CIRCUIT JUDGE

JACK D. WARREN, et als.,	IN THE CIRCUIT COURT ST. CLAIR COUNTY, ALABAMA
Plaintiffs,	PELL CITY
VS.	CIVIL ACTION NO: CV-87-126
JIM SKINNER FORD, INC., et als.,	
Defendants.	Notice of Appeal:

Motion in the above-styled cause being heard before the HON. H. E. HOLLADAY, Circuit Judge, 30th Judicial Circuit, at the St. Clair County Courthouse, Pell City, Alabama beginning on February 11, 1988.

APPEARANCES:

HON. WM. TRUSSELL, Attorney of Record for the plaintiffs, Pell City, Alabama.

HON. JOHN GALESE, Attorney of Record for the defendants, Birmingham, Alabama.

HON. STEVE ROE, Attorney for First Alabama Bank, Birmingham, Alabama.

THE COURT: Court come to order.

MR. TRUSSELL: Mr. Galese advised me that he forwarded a brief to the Court. I haven't received a brief. There are a couple of stipulations that we have discussed dealing with the residence of the parties of the transaction.

MR. GALESE: Yes, sir. We can stipulate that the plaintiffs are now and were at the time of the transaction residents of this County.

MR. TRUSSELL: And in addition, Jim Skinner's dealership where this automobile was purchased is located in Jefferson County, Alabama, Birmingham.

MR. GALESE: Well, Jim Skinner Ford is a Delaware Corporation located in Jefferson County, Alabama.

MR. TRUSSELL: I understand that they are incorporated in the State of Delaware. We can stipulate to that, and, also, that the dealership where Mr. Warren bought this vehicle is located in Jefferson County, Alabama.

MR. GALESE: There is a problem with that because when this matter was under motion to transfer, it was your decision that the transaction was consummated in this County, so we are not going to back off that. The dealership is located solely within Jefferson County.

MR. TRUSSELL: That is all I was getting at.

MR. GALESE: And the Ford came from Detroit.

MR. TRUSSELL: The Ford from Detroit, yes.

MR. GALESE: And the car was manufactured outside the State of Alabama.

MR. TRUSSELL: We can stipulate the car was manufactured outside the State of Alabama, and the Ford Motor Company is located in Detroit, Michigan, and that Jim Skinner Ford is a Delaware Corporation, and the dealership where this particular automobile was purchased is located in Jefferson County, and the plaintiffs were residents of St. Clair County.

THE COURT: What about the stipulation that the defendant was doing business in St. Clair County?

MR. TRUSSELL: Well, that issue is not before the Court. There was a motion, a venue motion, which we —

THE COURT: Has that been ruled on?

MR. TRUSSELL: That was ruled on by agreement.

MR. GALESE: Yes, sir.

THE COURT: Okay.

MR. GALESE: As I understand it, Judge, the only issue under the Federal Arbitration Act is, No. 1, whether there was an agreement to arbitrate, and, No. 2, whether or not the contract has an impact upon, or effect upon interstate commerce. If it is, Alabama law and the Federal law says the action is to be arbitrated. And Your Honor has already ruled that and granted the motion to arbitrate.

THE COURT: All right. Are you ready to proceed?

MR. TRUSSELL: Yes, sir, Your Honor.

THE COURT: All right.

MR. TRUSSELL: I think that we can probably agree in this motion that, really, the issue before the Court is whether this particular transaction is governed by the Federal Arbitration Act. Of course, it is governed by the State Arbitration Law. The State Arbitration Law prohibits the specific enforcement of an arbitration contract. The Federal law is different. The Federal law, the courts can specifically enforce an arbitration agreement under the Federal Arbitration Act. However, I have submitted to the Court three cases which, I think, are squarely on point in this case. Shearson Hayden Stone versus Liang, 493 Fed 2nd — excuse me — Fed. Supp. 104. Morse versus Swank Incorporated, 493 F. Supp. 110. Bryant-Durham Electric Company, Inc. versus Durham Durham County Hospital Corporation, 256 Southeastern 2nd 529. And Paramore versus Inter-Regional Bank through the leasing company, 316 Southeastern 2nd 90.

Your Honor, each of these cases hold that in order to determine whether a particular transaction is governed by the Federal Arbitration Law, you have to look at the transaction itself and determine whether the transaction involves interstate commerce. Each of these cases held that, basically, you look to the purchase of the transaction, my clients bought this vehicle in Jefferson County, Alabama. The place of incorporation of the defendant has absolutely nothing to do with whether or not the transaction involves interstate commerce. It has to do with where the purchase was made and where the order for the purchase was made. You look at that sort of thing to determine whether you have a transaction involving interstate commerce. These cases hold that, and they are very similar cases. Basically, when a transaction does not involve interstate commerce, you can't contract Federal intervention you can't put in your document and say this is going to be governed by Federal Law. It, in fact, has to involve interstate commerce. If it does, then, you can't obviously rely on the Federal Arbitration Law. I know Mr. Galese is going to make a big point that he is

incorporated in a foreign state, therefore, that makes people who go down to Birmingham and buy a car from Jim Skinner somehow impact interstate commerce, and that is just not the law. It also is not the law that part of the transaction you paid Ford Motor Credit, or someone else outside the State, that doesn't make the transaction interstate commerce. One of these cases deals squarely on that. In fact, it is a lease contract, a lease payment was being made out of state to some financial company located out of state. I think the law is quite clear that you do look to the transaction. The purpose of stipulating stipulations here, as I wanted it in the record, without any debate or argument that this transaction occurred in Birmingham, Alabama, that is, my client went down — excuse me — that's not what happened here. Actually, this particular transaction was consummated in St. Clair County, that is why we did have a problem with venue. But the purchase was from a dealership, which is located in Jefferson County, Alabama, Jim Skinner Ford. The actual consummation of the contract occurred within the State of Alabama, that is, St. Clair County. There is nothing to impact interstate commerce as far as this transaction is concerned, and therefore, it is governed by State Law. Under the State Law, arbitration is not specifically enforced. That is basically what those three cases hold.

THE COURT: Have you furnished Mr. Galese with these?

MR. TRUSSELL: Yes, sir.

MR. GALESE: May it please the Court. I did have a chance to read the cases he submitted about a week or so ago. Your Honor has correctly ruled in this case already. Alabama has changed its posture regarding the applicability of the Federal Arbitration Act in matters arising within the State, and that happened as the result of a case of Ex parte Alabama Oxygen, which I know that Your Honor is familiar with. The Alabama Supreme Court refused to enforce the Federal Arbitration Act in that case.

THE COURT: Which one?

MR. GALESE: It's in the brief, Ex parte Alabama Oxygen. That was the first case in Alabama under the Federal Arbitration Act. Historically and statutorily, Alabama has encouraged arbitration, but has found as void pre judgment dispute arbitration agreements. In Ex parte Alabama Oxygen, the Supreme Court again refused to enforce an arbitration agreement under the FAA. That went up to the United States Supreme Court, and the United States Supreme Court said that irrespective of any State laws to the contrary, the Federal Arbitration Act preempts all state statutes and state common law in connection with claims that arise under the act. The case law since Ex parte Alabama Oxygen in this State is without contradiction. Every case without exception that has been presented to the Supreme Court of Alabama since Ex parte Alabama Oxygen — there have been six of them through yesterday's date — I ran that back up on West Law to see — without exception all six cases in Alabama that are cited in the brief all say that the Federal Arbitration Act, No. 1, has deliberately construed in favor of arbitration, and, No. 2, preempts state law so that the arbitration agreement is given full faith and full force. Now, as I understand it, the only issue presented today by Mr. Trussell isn't that, in fact, there is a written contract, but it is only whether or not the contract has impact upon or affects interstate commerce. Because if it doesn't have an impact upon interstate commerce, then the Federal Government can't regulate it under the Federal Arbitration Act. I don't dispute that. As I understand, that is the only issue presented. First of all, Jim Skinner Ford is a foreign corporation. Ford Motor Company, a defendant in this case, is a foreign corporation. The vehicle was manufactured in a different state. It was transported to this State. It was sold and it traveled on interstate highways. If there ever has been an industry that is regulated by the Federal Government under the strength of the commerce clause, it is the automobile industry. They regulate — they being the U.S. Government through the Federal

Statutes — regulate every aspect of a motor vehicle transaction from its design, its manufacture, its assembly, its transportation across interstate highways, its sale by the selling dealer, its financing charge, the odometer certification, every aspect of a motor vehicle sale is regulated by Federal Statute under the powers that Congress has in connection with matters effecting interstate commerce. Now, the cases cited by Mr. Trussell, first of all, two of the three cases are North Carolina Civil Court of Appeals cases, not even the highest jurisdictional court of that state. Those cases say that in viewing whether or not a transaction involves, affects or deals with interstate commerce, the Court takes a strict and narrow view. That is contradictory of Alabama Law. In the case that is cited to Your Honor, the case of Ex parte Costa and Head (Atrium) (Ltd) a Birmingham Organization, the Alabama Supreme Court in 1986 says the requirement of the Federal Arbitration Act that the agreement involved commerce has been construed very broadly so that the slightest nexus of the agreement with interstate commerce will bring you within the Federal Arbitration Act. Mr. Trussell would rather, Your Honor, take North Carolina's view back in 1980, or '83, that you have to strictly determine whether the contract affects commerce. I submit to you that the Alabama Supreme Court in Ex parte Costa and Head said just the contrary. We abandon the strict view, and we take the broad view so that if the Court finds the slightest nexus, and I am quoting the Supreme Court, the slightest nexus under the agreement with interstate commerce, the Court then must bring it within the ambit of the Federal Arbitration Act. To suggest that the sale of a new motor vehicle, manufactured out of state by a foreign corporation, doesn't involve in some fashion commerce would be to ignore about eleven Federal Statutes that regulate my client's business and industry in connection with the sale of vehicles. In light of the Supreme Court's determination and direction to Your Honor that you should take the most broad view to

enforce the Federal Arbitration Act and find only the slightest nexus to do so, Your Honor has to come to the conclusion realistically that Your Honor's first decision in this case was well thought out, sound, and proper. And for that reason, we submit that his motion to reconsider should be overruled.

THE COURT: The Alabama Oxygen Ex parte, what was involved in that as far as factual situation?

MR. GALESE: It was a contract that dealt with canisters, as I recall, dealt with canisters of oxygen that were sold within the State of Alabama, but in fact had come across State lines. That reminds me of one thing, the classic case we studied in law school, Catsenback (sic) versus McClone. They held Ollie's Restaurant in compliance —

THE COURT: That is what I was about to say, the old Ollie's —

MR. GALESE: Like bread and toilet paper that was sold and used in their restaurant was sufficient to uphold —

THE COURT: That case involved the fact that the product of food was shipped across the State line.

MR. GALESE: Yes, sir, that's all it involved. And they said that that is a contract effecting interstate commerce. And, of course, we stipulated, and there is no question that the vehicle involved in this case was manufactured by Ford Motor Company in a different state, shipped in here, and sold as a — never having previously been sold vehicle. Even if it wasn't for the Catsenback case, Your Honor has to know that there is more legislation affecting the sale of motor vehicles than probably any other single product. And it could only have been done by Congress under the guise of and strength of the Commerce Laws.

MR. TRUSSELL: Your Honor, I would like to respond to two or three points. There is no question that the car was manufactured outside the State and shipped to Alabama. As far as I know, they don't have any Ford plants located in the State of Alabama. Mr. Galese is correct about that. There is also no doubt that a dispute arose between the dealer who bought the car and the man-

ufacturer who sold the dealer the car. If the contract provides for Federal Arbitration of disputes arising under that contract, I don't think there would be any question that the Arbitration Law would apply. This is not a sale by Ford of Detroit to Mr. Warren. This is a sale by Jim Skinner. Now, what is the slightest nexus he is referring to? He is talking about manufacturer of the vehicle. Well, that has nothing to do with that vehicle being manufactured out of state then brought into Alabama and then it is resold in Alabama. So I submit to you that the manufacturer of a vehicle that is shipped into Alabama, this all occurred prior to this transaction in connection with the purchase by Jim Skinner, is irrelevant. Now, the second thing I point out, there are a line of cases, in fact, I think almost all of them distinguish the interpretation of commerce under this statute from the commerce in civil rights cases. There is no question in civil rights cases that they look for the slightest nexus, but there is a lot of authority, and I think the prevailing view is, that commerce is not quite so broad, either. If Mr. Galese has his way, then every contract, almost, the purchase of any goods, if I go down to TG&Y and purchase a fork, that little fork was probably manufactured in Korea or something, and they can put in their contract, in their little bill of sale document to me, this is going to be governed by the Federal Arbitration Law. The import of what he is saying is that we can take 80 or 90 percent of the sale cases out of this court, or out of Alabama law in any event, and make Federal questions out of them. I feel like that — well, I just don't think there is any question that the transaction here involved was an intrastate transaction. The purchase by a St. Clair County individual of an automobile from a dealership located in Birmingham is an intrastate transaction. I don't think there is any slightest nexus with any interstate commerce. Therefore, I think the motion is due to be —

THE COURT: Have you read the Ex parte Alabama Oxygen Company?

MR. TRUSSELL: First of all, Your Honor, I haven't received Mr. Galese's brief until this morning. Secondly, I didn't understand Mr. Galese to say that that case held that Federal Law controlled. I thought he said, and I may be mistaken of what he said, but I thought he said that the Supreme Court in that case held that Alabama Law.

MR. GALESE: That is what the Alabama Supreme Court held, and it was appealed to the U. S. Supreme Court, and they reversed the Alabama Supreme Court.

MR. TRUSSELL: Let me say this. You have to look at the fact situation. If this involved the purchase of canisters outside the State of Alabama by someone in the State of Alabama, then I don't have any doubt that the Federal Arbitration Law. What you are going to have to do is look at some transaction itself and each specific fact situation.

THE COURT: What was the last statement you made about you were having problems with?

MR. TRUSSELL: If somebody sold canisters that were out of state through the mail, or shipped them into the State of Alabama to an Alabama resident, then I have no doubt that if in those contracted documents, you could probably contract that Federal Law applies. My point is that it turns on fact situations. Where was the contract entered into? Where was the seller located? Where was the buyer located? A bunch of cases that my research indicated --

THE COURT: In other words, you are distinguishing there that on the basis that the product in the Oxygen Company case was sold through interstate commerce to an Alabama purchaser?

MR. TRUSSELL: Yes, sir.

THE COURT: Shipped in here to the purchaser?

MR. TRUSSELL: That's the whole key.

THE COURT: If that be the case, I have not read this case at this time, then it would be distinguished from the Warren Case.

MR. GALESE: Well, Judge, I wouldn't want you to think that I am relying solely on the Ex parte. Costa and Head is the case that —

THE COURT: I take that because you cited a lot of other cases here, this '84 case that has been decided since then.

MR. GALESE: Yes, sir. The first case in Alabama upholding Federal Arbitration came in the Ex parte Alabama Oxygen as a result of the U. S. Supreme Court so holding. Subsequent to that, 100 percent of the appellate decisions in Alabama have upheld the Federal Arbitration. And all of them say exactly what Costa and Head said, that you must interpret broadly so that it is enforced, and you only must find the slightest nexus.

THE COURT: What was the fact situation in the Costa and Head case?

MR. GALESE: Costa and Head was a dispute between a contractor and a sub-contractor for the construction of some improvements on the old Lovemans' building downtown Birmingham, that's all. It didn't involve contractors across state lines.

THE COURT: The contractor and sub-contractors were residents of Alabama?

MR. GALESE: Yes, sir.

THE COURT: And the work was done in Alabama?

MR. GALESE: Yes, sir.

THE COURT: What was the factual situation that brought it under the Arbitration?

MR. GALESE: There was a contract that said the parties were to arbitrate under that Act. And the Court found that because an aspect of the contract was involved, the use of materials —

THE COURT: The contract itself provided?

MR. GALESE: Yes, sir. The contract in this case provides it. We have a written contract that has been attached to the motion in which the parties agree to submit —

THE COURT: One of the basis of originally granting your motion —

MR. GALESE: — was the written contract. Let me answer something Mr. Trussell said. He said where is the slightest nexus in this case? Even if there was no Federal Law regulating the sale of motor vehicles to retail purchasers, and there is, the Federal Odometer Act. His

client got an odometer statement pursuant to that Act. The fact is, he sued Ford Motor Company in this case. He sued them under a Federal Statute, the Magnuson-Moss Act. He sued them for breach of warranty in connection with the vehicle. He even, irrespective of all the other law, has created that which could be considered as the slightest nexus in the case. There is much more than a slight nexus in the case.

MR. TRUSSELL: Now, he is submitting that by filing my lawsuit, some allegation made in my lawsuit, invokes interstate commerce, Your Honor, that ridiculous.

MR. GALESE: That's not what I said at all. The point is that he brings claim in this action against a foreign corporation, which is Ford Motor Company, who extend the warrant. He brings claim under the Magnuson-Moss Act, which is an Act that was passed because of the impact of interstate commerce of goods that travel interstate commerce. Mr. Trussell would like to have it both ways.

MR. TRUSSELL: Your Honor, Magnuson-Moss provides — Mr. Galese knows that he would remove this case to Federal Court in a minute if he could. So there is no question that the Federal jurisdiction is not invoked here.

MR. GALESE: We are not talking about Federal jurisdiction.

MR. TRUSSELL: We are talking about —

MR. GALESE: Excuse me. I didn't interrupt you, did I?

MR. TRUSSELL: Excuse me.

MR. GALESE: Judge, we are not talking about Federal jurisdiction. We are talking about whether or not this contract has any slightest nexus to interstate commerce. That is the only issue. The Magnuson-Moss Act does provide a forum in the State or Federal Court, but that Act was passed by the Federal Government on the strength that the sale of consumer goods flowed to interstate commerce. The very precise issue we are talking about, Judge.

MR. TRUSSELL: One last question, and I will shut up and you can talk.

Your Honor, if Mr. Galese is correct in this case, from now on, we won't have to worry about any automobile cases in the State court, because he has come up with a way, and I will promise you this, I haven't read his cases, but this will be the first time in the history of the Alabama courts that an Alabama State Court has held that an arbitration agreement involving the sale of an automobile is specifically enforced. If he is correct, then he is changing the law of this State. And I'm sure all of the automobile dealers in this State will be glad to hear it, because they are all going to put this provision in their contracts. But it will be a novel point, and we will just have to see what the Appellate Court says about it.

MR. GALESE: Well, I'm not — Judge, I don't represent all the dealers. I represent a lot. And I can tell you Judge Cook in Bessemer has upheld this on at least ten occasions, the precise same language, involving the document. Judge Bryan has upheld it in connection with other car clients I represent, Eastwood Ford and others. I have had it upheld in two other counties. I'm not saying that you should even consider that, but I'm responding to what he said. I didn't create this law, the Government did. I didn't interpret it, the Alabama Supreme Court did. They are the ones that say intrastate transactions that have any impact at all on interstate commerce, if there is a contract to arbitration under the FAA, it must be arbitrated. It sounds like he has me out here on the point, and if you agree with me, you are out here on the point, and he is threatening this great appeal.

MR. TRUSSELL: I'm not —

MR. GALESE: Excuse me. I didn't interrupt you, Bill.

MR. TRUSSELL: Yes, you did interrupt me, and I'm going to interrupt you now. I didn't threaten any appeal. I'm just saying that is a novel point. If this Court rules that, I am not aware of any written opinion issued by any appellate court in the State of Alabama that would require specific arbitration in products automobile cases.

THE COURT: Assuming that the fact situation in the Oxygen Company case, and also in the Costa and Head are as he states, what distinguishing factors as far as the product is concerned, what difference does it make whether it is an automobile or an oxygen tank or —

MR. TRUSSELL: I would say this, Your Honor, and I haven't read Mr. Galese's cases, but I would go out on a limb and say that there is no case that he cited that held that a pure intrastate purchase by a local seller and local buyer is governed by the Federal Arbitration Law, without even reading those cases. If those cases hold what he says they hold, then I think that the Court will have to follow that, but I am confident that they don't.

MR. ROE: Your Honor, I was sitting here reading the cases while we were arguing. I'm Steve Roe for First Alabama Bank. We support his motion by the way. One of the cases that he cited was McKinley versus E. F. Hutton where the plaintiffs were customers of E. F. Hutton in Mobile. Their account executive was a person in Mobile, and they lived in Mobile, and they purchased a product, in this case, a single premium deferred annuity. They went over to their broker and bought something. And the annuity was issued by E. F. Hutton on some company that later turned out to be a bad company. They sued E. F. Hutton. They sued their broker in Mobile. They went into a brokerage house in Mobile, and they bought a product in Mobile. They didn't like the product. They didn't sue the person that issued the product. They sued the person who sold it to them, the salesman in Mobile. There was an arbitration clause in the contract they had with E. F. Hutton, and the Supreme Court said that's controlled by arbitration. There is one example of something that is between two people in Alabama over something they bought that they didn't like. The Supreme Court held that that was subject to arbitration. In another one, Shamrock Food Services versus Birmingham — in re Shamrock Food Services involved a contract between Shamrock Food Services —

THE COURT: Is that cited in the brief?

MR. GALESE: Yes, sir.

MR. ROE: I am sure we could provide Your Honor with a copy.

MR. TRUSSELL: I would like to be provided with copies of it, too, since I feel at somewhat a disadvantage having to —

MR. ROE: That one involved a dispute between Birmingham Southern and Shamrock Food Services, Inc. over a contract between them for the providing of food services by Shamrock to Birmingham Southern. Although the case is somewhat cryptic in what happened, it doesn't say anything about where the services were provided. I have to assume it was Birmingham Southern, which is located in Birmingham, that it arose in Birmingham. They make the statement that the Federal Arbitration Act was intended to reverse centuries of judicial hostility to arbitration agreements. While I as a lawyer might hate to see the day coming where all these things are going to be arbitrated, that seems clearly the way the Supreme Court is headed.

MR. TRUSSELL: May I respond to the Hutton case, Your Honor. Hutton was selling a broker. You can, of course, sue a broker directly without suing the person he is selling for. This was to purchase insurance from an out-of-state company through a broker. The broker not being the owner, but sued the broker. I think negligence, malpractice and misrepresentation. But the point is that the item being sued, the subject of the contract, was something coming from out of state. This is a pure intrastate transaction. The only, quote, nexus is the fact that it was manufactured and previously came in from out of state. But it was owned in Alabama and sold to someone else in Alabama. Now, if the nexus is the fact that it was manufactured way back in its history and sent into Alabama, then it is going to take — the Federal Law would assume the State law in this matter. Almost all items sold in Alabama, 99 percent, I would hazard a guess, are manufactured elsewhere.

THE COURT: What is your response to the factual provisions in the contract that would be submitted for arbitration?

MR. TRUSSELL: Unless the transaction effects intrastate commerce, and I think we are all in agreement in this, the contract provision is not binding. It has to effect interstate commerce to be governed by Federal Law. Once it is governed by Federal Law, you look to the contract. And the Federal Law is that arbitration is specific enforcement. But if it is not a transaction involving interstate commerce, then you never get to the point of applying Federal Law, you apply Alabama law. Alabama law says it is not specific enforcement. The issue here in this case is whether this specific fact situation, if this transaction involved or effects interstate commerce. There are a gillion cases, and I would like to see —

THE COURT: I think the Federal Court can bring in the commerce provision — I mean involve interstate commerce. It's been pointed out always, I think right after I got out of law school, in the Ollie Barbecue case, which I thought at that time was ridiculous. Still, as you say, it was a civil rights question, but still, that is what the courts held at that time that it involved — interstate commerce was one of the last things that Ollie Barbecue at that time ever imagined would be brought into Federal Court.

Gentlemen, I think I understand the issues clearly enough. I will take this under advisement. I will be frank with you, I have not read your cases, Mr. Galese, that you cited in the brief, which did not arrive until late yesterday afternoon.

MR. GALESE: Judge, these are not yet published opinions of the Alabama Supreme Court. I will be happy to give you copies.

* * * * * * * *

Federal Arbitration Act, 9 U.S.C. §§ 1-13

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the

issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 [28 USCS], in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or

issues to a jury in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and

in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may

apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award is made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same, vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
(c) Where the award is imperfect in the matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Ala. Code (1975) § 8-1-41

§ 8-1-41. Obligations which cannot be specifically enforced.

The following obligations cannot be specifically enforced:

(1) An obligation to render personal service;

(2) An obligation to employ another in personal service;

(3) An agreement to submit a controversy to arbitration;

(4)An agreement to perform an act which the party has not power lawfully to perform when required to do so;

(5) An agreement to procure the act or consent of the wife of the contracting party or of any other third persons; or

(6) An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.

89-5[illegible]

FILED

NOV 3 1989

JOSEPH F. SPANIOL, J
CLERK

No. 89-210

In The

Supreme Court of the United States

October Term, 1989

JIM SKINNER FORD, INC.,

Petitioner,

v.

JACK D. WARREN and JUANITA WARREN,

Respondents.

On Petition For A Writ Of Certiorari To The Alabama Supreme Court

BRIEF FOR RESPONDENTS JACK D. WARREN AND JUANITA WARREN IN OPPOSITION

WILLIAM J. TRUSSELL
Counsel of Record

Of

CHURCH, TRUSSELL & ROBINSON, P.C.
1609 Cogswell Avenue
Pell City, AL 35125
(205) 338-2295

Attorneys for Respondents, Jack D. Warren and Juanita Warren

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

1. Do the provisions of the Federal Arbitration Act, 9 U.S.C. § 1 (1982), et seq., apply to disputes arising from the purchase for consumer use of a motor vehicle pursuant to an adhesion contract by an Alabama resident from an automobile dealership with its sole place of business located in the State of Alabama?

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SUMMARY OF ARGUMENT

The Alabama Supreme Court ruling in this case is not governed by *Perry v. Thomas*, 482 U.S. 483 (1987) or *Southland v. Keating*, 465 U.S. 1 (1984). In these cases, the subject contracts evidenced a transaction involving commerce within the meaning of the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (1982), hereinafter referred to as the FAA. It is a well settled principle that state law is preempted by the FAA for those disputes within its operation. However, the question presented here is whether the FAA applies to the contract at issue. The Petitioner asserts that the Alabama Supreme Court's ruling in this case conflicts with numerous federal statutes that regulate the sale of motor vehicles. The logic of this conclusion escapes the Respondent. This decision does not hold that Congress lacks the authority under the commerce clause of the Federal Constitution to pass laws to protect consumer interests in connection with the purchase of a motor vehicle. Clearly, Congress has such authority. Rather, this decision simply holds, based upon the legislative history of the Act and prior judicial decisions, that the FAA does not apply to intrastate consumer purchases. The Petitioner argues that arbitration is required under the FAA in adhesion contracts. Whether arbitration should be mandated in these type transactions which are not arms-length and bargained for provisions, is a question properly left with Congress after hearings and debates. It is unlikely that Congress would ever seriously consider passing the type of legislation advanced by Petitioner under its strained interpretation of the FAA. The denial of access to the courts for defective consumer products which would result from this construction of the

FAA constitutes a threat to the rights of every citizen. It is not a subjective application of the law to hold that these transactions are not governed by the FAA, but rather such a ruling is a reaffirmation of historical precedent.

ARGUMENT

Contrary to Petitioner's assertion, this case does not represent hostility by the Respondents or the Alabama Courts to the appropriate application of the Federal Arbitration Act. This case illustrates that the FAA is not a statute intended for general application to all contracts, but Congress limited it to specific types of agreements. Section 2 of the FAA specifically limits it to maritime transactions and to "contracts evidencing transactions involving commerce." 9 U.S.C. § 2 (1982). The term commerce is specifically defined in § 1 of the Act.[1]

The Respondents acknowledge that if the subject agreement is a contract evidencing a transaction involving commerce as that term is defined in the FAA, then due to federal preemption announced by this Court in *Southland v. Keating*, 465 U.S. 1 (1984), the Petition for

[1] 9 U.S.C. § 1(1982) provides in pertinent part: . . . "commerce", as herein defined means commerce among the several states or with foreign nations, or in any territory of the United States or in the District of Columbia or between any such territory or another or between any such territory and any state or foreign nation or between the District of Columbia and any state or territory or foreign nation but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Certiorari is due to be granted. However, the Respondents submit that the legislative history as well as the previous judicial rulings construing the Act clearly demonstrate that it does not apply to the type of transaction presently before the Court. The provisions of the FAA do not and never were intended to apply to contracts of adhesion involving the consumer purchase of a product by a citizen from one state from a retailer residing in the same state.

The Petitioners principally argue that the power of Congress to regulate interstate commerce under Article I of the Federal Constitution is identical with the statutory definition of commerce used by § 1 of the FAA. Stated differently, Petitioners assert that the phrase "contract evidencing a transaction involving commerce" under the FAA has the identical meaning as the affecting interstate commerce standard used in construing the power of Congress under Article I of the Constitution. This assertion ignores the differing legislative histories of these laws and their origins, the problems sought to be remedied, and the numerous judicial decisions construing the precise language used in the respective provisions.

To distinguish between the jurisdiction of the FAA and Congress' authority under the commerce clause of Article One, it is useful to review the legislative history of the Act. The FAA was passed by Congress in 1924. The original proposal was drafted by the American Bar Association Committee on Commerce, Trade and Commercial Law using New York State Law as a model.[2] Hearings

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[2] Hearings on S. 4213 and 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Congress, Fourth Session, page 1 through 3 (1923) (Remarks by Charles Bernheimer) hereinafter cited as Hearings on S. 4214.

were originally held by the Senate Judiciary Committee in 1923. At these hearings some members of the Senate were concerned about the application of the Act to adhesion contracts or other "take it or leave it" type arrangements.[3] The debates during these hearings revealed that the legislation was not aimed at such contracts, but was intended to empower courts to enforce arbitration clauses entered into in arms-length transactions between merchants.[4] Senator Julius Cohen, a key drafter of the legislation testified extensively at the subsequent 1924 joint Congressional hearings on the proposed bill. It was Mr. Cohen's view that the proposed legislation was not suited for all types of contractual disputes, but it was a remedy particularly useful to disputes between merchants.[5] In an article jointly authored by Senator Cohen in the Virginia Law Review in 1926, he observed:

> "Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact-quantity, quality, time of delivery, compliance with terms of payment, excuses for nonperformance, and the like. It has a place also in the determination of the simpler questions of law – the questions of law which arise out of the daily relations between merchants as to the passage of

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[3] Hearings on S. 4214, *supra*, note 2 at 9-11. See also, Atwood, *Issues in Federal-State Relations Under the Federal Arbitration Act*, 37 University of Fla. L. Rev. 61, 75 (1985).

[4] Hearings on S. 4214, *supra*, note 2 at pages 9-11.

[5] Joint Hearings on S. 1005 and H.R. 646, before the Subcommittee of the Committees on the Judiciary, 68th Congress, First Session (1924).

> title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned."[6]

Early disputes involving the FAA dealt with the type transactions in which Congress was primarily concerned when the legislation was adopted. Most of the reported cases did not attempt to define the phrase "contract evidencing a transaction involving commerce" other than to determine whether the facts then before the court satisfied this requirement. These decisions concerned disputes arising out of contracts between citizens of different states involving the shipment of goods through interstate commerce or concerned construction contracts where much of the material was shipped through interstate commerce.[7] In these cases the courts had little difficulty in finding that sufficient interstate commerce was involved so as to cause the claims to come within the purview of the FAA.

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[6] Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 281 (1926).

[7] The following cases have dealt with interstate shipment of goods by merchants: *Krauss Bros. Lumber Co. v. Lewis Bossert & Sons, Inc.*, 62 F. 2d 1004 (2nd Cir., 1933); *Shanferoke Coal & Supply Corp. of Delaware v. Westchester Service Corp.*, 70 F. 2d 297 (2nd Cir., 1934), cert. granted, 293 U.S. 541, aff'd., 293 U.S. 449 (1934); *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2nd Cir., 1959), cert. dismissed, 364 U.S. 801 (1960); *Kanmak E. Mills v. Society Brand Hat Co.*, 236 F. 2d 240 (8th Cir., 1956), *Standard Magnesium Corp. v. Fuchs*, 251 F. 2d 455 (10th Cir., 1957). The following cases dealt with construction contracts: *Lawson Fabrics, Inc. v. Akzona, Inc.*, 355 F. Supp. 1146 (S.D. N.Y., 1973),

(Continued on following page)

Eventually, this Court determined that disputes could come within the jurisdiction of the FAA even though the subject contract was not for the interstate shipment of goods but only where it related to interstate commerce. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Following *Prima Paint*, a number of cases held that employment contracts which did not involve the interstate shipment of goods were controlled by the FAA.[8] As a result of the ever-expanding scope of the FAA, a general principle evolved which underlies the factual determination of when a contract evidences a transaction involving commerce. One of the earliest decisions to announce this principle was *Metro Industrial Painting Corp. v. Terminal Const. Co.*, 287 F. 2d 382 (2nd Cir., 1961) cert. denied, 368 U.S. 817 (1961). In *Metro*, Chief Judge Lumbard in his concurring opinion determined that a contract by a Connecticut and New Jersey

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(Continued from previous page)

affirmed, 486 F. 2d 1394 (2nd Cir., 1973); *McElwee-Courbis Const. Co. v. Rife*, 133 F. Supp. 790 (D.C., P.A., 1955); *Sterling Foundations v. Merritt-Chapman & Scott Corp.*, 134 F. Supp. 327 (D.C. N.Y., 1955); *E. I. Du Pont De Nemours & Co. v. Lyles & Lang Const. Co.*, 219 F. 2d 328, cert. denied 349 U.S. 956 (1955); *Warren Bros. Co. v. Community Building Corp. of Atlanta, Inc.*, 386 F. Supp. 656 (D.C. N.C., 1974); *Galt v. Libbey-Owens-Ford Glass Co.*, 376 F. 2d 711 (7th Cir., 1967); *Monte v. Southern Delaware County Authority*, 321 F. 2d 870 (3rd Cir., 1963); *Electronic & Missle Facilities, Inc. v. United States*, 306 F. 2d 554 (5th Cir., 1962), Reviewed on other grounds, 374 U.S. 167 (1963).

[8] *GAF Corp. v. Werner*, 485 N.E. 2d 977 (N.Y. App. Ct., 1985), cert. denied 475 U.S. 1083 (1986); *Tonetti v. Shirley*, 173 Cal. App. 3d 1144 (4th Dist., 1985); *Varley v. Tarrytown Associates, Inc.*, 477 F. 2d 208 (2nd Cir., 1973); *Dickstein v. duPont*, 320 F. Supp. 150 (D.C., Mass., 1970) affirmed 443 F. 2d 783 (1st Cir., 1971).

corporation to paint certain buildings in Florida did evidence a transaction involving commerce. In reaching this conclusion, Judge Lumbard observed:

> "The language of § 2 of the Arbitration Act might suggest that the test to be applied is a formalistic one. The statute does not purport to affect arbitration provisions in all contracts involving commerce; it puts its stamp only on such provisions when incorporated in contracts *evidencing a transaction* involving commerce. Were it not for the broad remedial purpose of the statute and for contrary indications in the legislative history, we might be justified in limiting the effect of the act to only those contracts which, on their face, reveal that some interstate transaction is to take place . . .
>
> The significant question, therefore, is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they *contemplated* substantial interstate activity." *Metro Industrial Painting Corp. v. Terminal Const. Co.*, 287 F. 2d 382, 387 (2nd Cir., 1961).

The decision in *Metro* enunciating the test of whether the parties contemplated substantial interstate activity was adopted by the North Carolina Court in *Burke County Public Schools Board of Education v. Shaver*, 303 N.C. 408, 279 S.E. 2d 816 (1981). In *Burke*, the Court, using the test enunciated in *Metro*, found a contract for the construction of a school building between a multi-state architectural firm and local Indiana school boards contemplated substantial interstate activity so as to be governed by the FAA. After quoting Judge Lumbard in *Metro*, with approval, the Court stated:

> "We do not mean to suggest that where the contracting parties are merely located in different states or where other facts tending only to show diversity of citizenship are present, the contract must necessarily be found to contemplate substantial interstate activity so as to trigger the act's applicability. Where, however, performance of the contract itself necessarily involves, so that the parties to the agreement must have contemplated substantial interstate activity the contract evidences a transaction involving commerce within the meaning of the Federal Arbitration Act." *Burke County Public Schools Board of Education v. Shaver*, 279 S.E. 2d 816, 822 (1981).[9]

This decision was subsequently followed in North Carolina in *Paramore v. Inter-Regional Fin. Group Leasing*, 316 S.E. 2d 90 (N.C. App., 1984), where the court held that a dispute concerning a tractor leased by the Plaintiff from the Defendant was not governed by the FAA because performance under the contract did not involve substantial interstate activity even though the rental payments were received by the Defendant at its out of state office. See also *Cahoon v. Ziman*, 298 S.E. 2d 729 (N.C. App., 1983), review denied, 301 S.E. 2d 388 (N.C., 1983).

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[9] In footnote number eleven in *Burke County Public School Board of Education v. Shaver*, the North Carolina Supreme Court quoting Judge Lumbard's analysis observed "We note further that the Federal Arbitration Act unlike other statutes involving the commerce power does not attempt to regulate activity affecting interstate commerce. Instead, it provides for those who so desire and expeditious quasi-judicial process for settling disputes . . . " *Burke County Public School Board of Education v. Shaver*, 279 S.E. 2d 816, 820 (1981).

The Florida Court in *Riverfront Properties, Ltd. v. Max Factor III*, 460 So. 2d 948 (Fla App., 2nd Dist. 1984) also cited Judge Lumbard's analysis, with approval, in determining that a joint venture agreement executed in California and to be substantially performed there was not a contract evidencing a transaction in commerce. Thus, the Court concluded that the FAA did not apply even though the financing of the joint venture was obtained from a Florida lending institution.

The Respondents submit that the foregoing test enunciated by Judge Lumbard has been implicitly recognized, if not clearly stated, in almost every reported case dealing with the scope of the FAA. The Courts have uniformly applied the FAA only where the parties have contemplated substantial interstate activity.[10] Nevertheless, Petitioners assert that *Perry v. Thomas*, 482 U.S. 483 (1987) stands for the proposition that the affecting commerce standard used in determining the extent of Congress' power under the commerce clause is identical to the scope of the FAA. *Perry v. Thomas* involved a dispute with a national brokerage company over commissions from the sale of securities. The issue of whether a contract involving the sale of securities is a contract evidencing a transaction involving commerce was not seriously contested. By this time it was well settled that transactions involving the purchase and sale of securities on the national exchanges constituted commerce within the meaning of

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[10] The cases generally can be grouped into four categories: (1) Employment agreements; (2) merchant contracts involving interstate shipping; (3) contracts involving securities; and (4) construction contracts. See *Commerce*, Federal Practice Digest, 3rd Ed., key 80.5.

the FAA. See *Macchiavelli v. Shearson, Hammill & Co., Inc.*, 384 F. Supp. 21 (E.D., Cal., 1974); *Stokes v. Merrill Lynch Pierce Fenner & Smith*, 523 F. 2d 433 (6th Cir., 1975); *Shearson Hayden Stone, Inc. v. Liang*, 493 F. Supp. 104 (N. Dist. Ill., 1980). However, in *Perry v. Thomas* the principal issue confronting the court was whether the FAA pre-empted California state law on the subject of arbitration. In holding that state law was preempted by the FAA, the court observed that it was "Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the commerce clause." *Perry v. Thomas*, 482 U.S. 483, 490 (1987). The court was not saying that the FAA's jurisdiction was identical with Congress' authority under the commerce clause. Rather, in the context of the issue of preemption, the court was noting that Congress' authority is supreme in those matters involving interstate commerce. Furthermore, if a transaction is governed by the FAA, then pursuant to Congress' authority under the commerce clause, state law is preempted. It is important to recognize in Perry that the court was focusing on the preemption of state law and was not attempting to establish or overrule any existing precedent on what type of contracts evidence a transaction in commerce so as to be governed by the FAA.

Petitioner further argues that since Congress has the power under the commerce clause to pass an arbitration act applicable to cases such as the present case, then it necessarily follows that the FAA applies to the present transaction. (Petitioner's brief, p. 9). The Respondents do not contest Petitioner's assertion that Congress has the authority under the commerce clause to adopt arbitration

laws applicable to intrastate consumer purchases involving residents of the same state where the goods purchased have some nexus with interstate commerce. In fact, as Petitioner points out in his brief, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1981, et seq., and the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, 15 U.S.C. § 230 et seq., are appropriate examples of the exercise of Congress' authority. However, it does not follow that Congress intended for the FAA to apply to intrastate consumer sales simply because they may have the authority to adopt such a law. If Congress determines that the automobile dealer associations and other retailers need protection from consumers, there is no doubt it could make the appropriate legislative findings and enact statutory protections. However, the issue presented here is whether Congress intended for § 2 of the FAA to apply to contracts of adhesion where a consumer purchases a product from a retailer residing in the same state. The legislative history as previously stated, not only militates against such an unwarranted expansion of the Act, but it clearly indicates that such was not Congress' intent.

Not only have the courts consistently required more than the "affecting commerce standard" advocated by Petitioner, this standard was specifically repudiated by Judge Lumbard in *Metro*, where he stated:

> "Notwithstanding the finding in *Lawrence* that 'Congress intended to use to the fullest possible extent its powers to regulate commerce as it was affected by arbitration agreements,' the legislative history of the Arbitration Act of 1925 reveals little awareness on the part of Congress that state law might be affected. See *Note*, 69

> Yale L.J. 847, 863 (1960). Having no clear mandate from Congress as to the extent to which state statutes and decisions are to be superceded, we must be cautious in construing the act lest we excessively encroach on the powers which Congressional policy if not the Constitution would reserve to the states. It may be a close constitutional question indeed whether Congress could regulate arbitration provisions in all contracts 'affecting commerce' or between persons 'engaged in commerce' as these phrases have been defined by countless cases under the National Relations Act § 10(a), 29 U.S.C.A. § 160(a), or the Fair Labor Standards Act, §§ 6(a), 7(a), 29 U.S.C.A §§ 206(a), 207(a)." *Metro Industrial Painting Corp. v. Terminal Const. Co.*, 287 F. 2d 382, 386 (1961).

The Petitioner further attacks Judge Lumbard's test requiring that the parties contemplate substantial interstate activity in performing their contract as being subjective and, thus, hinders the policies behind promoting arbitration. This analysis reflects Petitioner's confusion over how the standard is applied by the court. The terms of the contract are the primary evidence in determining whether the parties contemplated substantial interstate activity. As noted by Judge Lumbard:

> "Cogent evidence regarding their state of mind at the time would be the terms of the contract and if it on its face evidences interstate traffic, such as did the shipment from New York to Massachusetts in the *Lawrence* case, the contract should come within § 2. In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated." *Metro Industrial Painting Corp. v. Terminal Const. Co.*, 287 F. 2d 382, 387 (1961).

Such an analysis is far less subjective than the approach advanced by Petitioner. The Petitioner would, in effect, abandon any test or standard in applying the FAA. If any remote nexus to interstate commerce could be developed, the Petitioner would argue that the FAA would control. Thus, as a practical matter, all consumer purchases would be affected since the majority of products bought and sold within a given state are manufactured elsewhere or at least packaged using materials or equipment from another state or country. Almost any contract which requires the use of tools, equipment or instruments in its performance, regardless of the remoteness to interstate commerce, would be governed by the FAA since in all likelihood such tools and equipment would be manufactured in another state. In the final analysis, Petitioners would use the FAA to usurp consumer protection laws and state contract laws irrespective of the adhesion nature of the agreement and the remoteness to interstate commerce. The present case is a typical example of Petitioner's argument taken to its logical conclusion. If an Alabama resident who purchases a motor vehicle for consumer use from another Alabama resident under an adhesion contract is required to arbitrate under the FAA, then consumer protection laws in every state are in peril. It is certain that Congress did not intend this perverted application of the FAA and neither has this court nor any other court to date applied the Act in such a fashion. In this regard, it is interesting to note that Petitioner fails to cite a single case in its brief with facts similar to the case at bar. The reason for this glaring omission is that neither Congress, the courts, nor even parties to private agreements, ever considered that the

FAA was intended to apply in such transactions. The Respondents submit that such legislation should be undertaken by Congress or State Legislatures only after careful consideration of the consequences to consumer rights.

CONCLUSION

For the reasons set forth above, the Petitioner's Writ for Certiorari should be denied.

Respectfully submitted,

WILLIAM J. TRUSSELL
Attorney for Respondents

CHURCH, TRUSSELL & ROBINSON, P.C.
1609 Cogswell Avenue
Pell City, Alabama 35125
(205) 338-2295

No. 89-567

IN THE

Supreme Court Of The United States

October Term, 1989

JIM SKINNER FORD, INC.,
Petitioner,

vs.

JACK D. WARREN AND JUANITA WARREN,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AUTOMOBILE DEALERS ASSOCIATION OF ALABAMA, INC. AND THE ALABAMA INDEPENDENT AUTOMOBILE DEALERS ASSOCIATION, INC. IN SUPPORT OF THE PETITION FOR CERTIORARI OF JIM SKINNER FORD, INC.

ROBERT A. HUFFAKER, ESQ.
Counsel of Record

General Counsel
Automobile Dealers Association
of Alabama, Inc.
Post Office Box 270
Montgomery, Alabama 36195
Telephone: (205) 834-8480

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Automobile Dealers Association of Alabama, Inc. (ADAA) and the Alabama Independent Automobile Dealers Association, Inc. (AIADA) respectfully move this Court for leave to file the accompanying brief as amicus curiae in support of the position of the Petitioner in this case. Consent to the filing of an amicus curiae brief has been requested of the Petitioner and the Respondent and has been obtained from the Petitioner. The Respondent has neither consented to nor objected to the filing of an amicus curiae brief as of the date of the filing hereof.

The ADAA and the AIADA are trade associations comprised of over 1,000 new and used automobile dealer-members located throughout the State of Alabama. ADAA and AIADA are affiliated with the National Automobile Dealers Association (NADA) and the National Independent Automobile Dealers Association (NIADA) which have over 14,000 new and used automobile dealer-members throughout the United States.

ADAA and AIADA's objectives include promoting the business of its members and assisting automobile dealers to comply with various state and federal laws and regulations affecting their business operations. Both trade associations work in concert with their respective parent organizations to encourage state legislatures and Congress to standardize laws and administrative procedures regulating the automobile industry throughout the United States.

Many of these members maintain their principal business addresses in Alabama but actually conduct business in Alabama and surrounding states. These businesses, although not parties to this action, are directly affected by the decision of the Alabama Supreme Court in *Ex Parte Jack D. Warren.*

In addition, one of these members currently has litigation pending in the United States District Court for the Northern District of Alabama, Southern Division, in which that Court has stayed the civil action in favor of arbitration under the provisions of 9 U.S.C. §1, *et seq.,* refusing to follow *Ex Parte Jack D. Warren.*[1]

ADAA and AIADA are filing this motion and brief to express their concern that automobile dealers conducting business in Alabama are not being offered the same federal rights under 9 U.S.C. §1, *et seq.,* as businesses in other states, and to point out the uncertainty of their rights and remedies resulting from the *Ex Parte Jack D. Warren* decision.

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[1]*Terri O. Williams vs. Dan Tucker Auto Sales, Inc.,* (89-AR-1350-S). Copies of the Motion to Stay, Motion to Remand and Order, in this unreported case are set forth in the Appendix to this Brief. (App. at A-1-5).

For these reasons, this motion for leave to file an amicus curiae brief should be granted.

Respectfully submitted,

ROBERT A. HUFFAKER, ESQ.
Counsel of Record

General Counsel
Automobile Dealers Association
of Alabama, Inc.
Post Office Box 270
Montgomery, Alabama 36195
Telephone: (205) 834-8480

IN THE

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BRIEF AMICUS CURIAE OF THE AUTOMOBILE DEALERS ASSOCIATION OF ALABAMA, INC. AND THE ALABAMA INDEPENDENT AUTOMOBILE DEALERS ASSOCIATION, INC. IN SUPPORT OF THE PETITION FOR CERTIORARI OF JIM SKINNER FORD, INC.

INTEREST OF THE ADAA AND THE AIADA AS AMICUS CURIAE

The Automobile Dealers Association of Alabama, Inc. ("ADAA") and the Alabama Independent Automobile Dealers Association, Inc. ("AIADA") are trade associations comprised of over 1,000 new and used automobile dealer-members located throughout the State of Alabama. ADAA and AIADA are affiliated with the National Automobile

Dealers Association and the National Independent Automobile Dealers Association, which together have 14,000 new and used automobile dealer-members throughout the United States. The ADAA and AIADA's objectives include promoting the business of its members and assisting automobile dealers in complying with various federal and state laws and regulations affecting the sales of motor vehicles. These dealer-members, although not parties to this action, are directly affected by the Alabama Supreme Court's refusal to apply the provisions of the Federal Arbitration Act ("FAA") 9 U.S.C. §1, *et seq.*, to the intrastate sale of motor vehicles.

The 1,000 dealer-members of ADAA and AIADA account for nearly all of the 1,200,000 automobiles sold in Alabama annually. Many of these sales are made pursuant to contracts which, like the contract in *Warren*, contain arbitration agreements. In Alabama, an estimated 200,000 of the automobile sales contracts executed in 1988 contained arbitration agreements.[1] Dealers who have used such arbitration agreements and others who may wish to use such arbitration agreements in the future are directly and adversely affected by the refusal of the Alabama Supreme Court to enforce arbitration agreements in new car sales contracts.

The opinion of the Alabama Supreme Court in *Ex Parte Jack D. Warren*, ___ So.2d ___ (1989), violates the federal rights of ADAA and AIADA members under the FAA to enforce arbitration agreements in automobile sales contracts, and stands in direct conflict with this Court's holdings in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and *Perry v. Thomas*, 482 U.S. 483 (1987).

This brief amicus curiae is filed contingent upon the granting of the foregoing motion for leave to file said brief. The ADAA and AIADA submit this amicus curiae brief to demonstrate that the Alabama Supreme Court's erroneous

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[1]The figures set forth herein are based upon AIADA records or estimates.

ruling below has costly and far-reaching effects for numerous dealers, consumers and litigants, including the 1,000 plus dealer-members of the ADAA and AIADA.

ARGUMENT

The Decision of the Alabama Supreme Court Deprives Numerous Alabama New Car Dealers of the Right to Enforce Arbitration Agreements and Promotes Forum Shopping.

The Alabama Supreme Court in *Ex Parte Jack D. Warren* held that the test under the Federal Arbitration Act for determining whether a transaction involves interstate commerce is a distinct standard unique to the application of the FAA, finding that Congress did not utilize its full Commerce Clause powers. The Court below held that in order for an arbitration agreement to be enforceable, the parties to the written agreement must contemplate substantial interstate activity. As noted in the petition for certiorari filed by Jim Skinner Ford, Inc., that conclusion is wrong. It stands in direct conflict with the decisions of this Court in *Perry v. Thomas,* 482 U.S. 483 (1987), and *Southland Corp. v. Keating,* 465 U.S. 1 (1984). The mechanism of summary reversal was created for cases such as this, so clear is the conflict between the decision of the court below and this Court's decisions in *Perry* and *Southland*. For the reasons set forth in the petition for certiorari, and because of the importance of the issue as discussed below, this Court should grant a writ of certiorari and summarily reverse the decision below.

There are 1,000 dealer-members of ADAA and AIADA. These dealer members account for nearly all of the 1,200,000 automobiles sold in Alabama annually, all of which are manufactured outside Alabama and originally distributed by the manufacturers in interstate commerce. Many of those sales are made pursuant to contracts which, like the contract in *Warren,* contain arbitration agreements. In Alabama, at least 200,000 of the automobile sales contracts executed in 1988 contained arbitration agreements. How-

ever, the substantial benefits which could be achieved through the use of the arbitration provisions in these sales contracts are now illusory in Alabama due to the erroneous decision of the court below.

The decision of the Alabama Supreme Court in *Ex Parte Jack D. Warren* adversely affects all of the 1,000 member dealers of the ADAA and the AIADA. Their federal right to enforce arbitration agreements in their automobile sales contracts will not be honored in the state courts of Alabama. The decision below renders the FAA and its policies ineffective in a large number of cases and prevents dealers from effectively reducing their dispute resolution costs through arbitration. The increased costs of resolving warranty claims and related disputes that necessarily will result from the Alabama Supreme Court's ruling ultimately will be passed to automobile purchasers in the form of higher automobile prices.

Of course, some consumers may not wish to purchase automobiles from dealers using arbitration agreements, and they certainly have that option. In Alabama, a citizen interested in purchasing an automobile can choose from hundreds of dealers all selling basically the same products. What frequently separates one dealer from another is price and the terms of the sale. Some dealers have incorporated arbitration agreements into their written contracts, while some have not. Some dealers employ such agreements as a selling tool, noting that disputes can be quickly and inexpensively disposed of without protracted, time-consuming and expensive litigation — the very purpose of the FAA. Still, if consumers do not wish to purchase their automobile from a dealer using arbitration agreements in its sales contracts, they are not required to do so. In the greater Birmingham metropolitan area — where Jim Skinner Ford conduts business — a consumer can purchase a new motor vehicle from 97 different dealers. Of these, 40 utilize predispute arbitration agreements in their sales contracts while the others do not.

In any event, automobile dealers and citizens alike have a right to expect that federal laws will be uniformly applied

across the country. Anything less defies the announced intent of Congress in passing the FAA — to enact a "national policy favoring arbitration and withdrawing the power of states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating,* 465 U.S. 1, 10 (1984). The decision of the Alabama Supreme Court below not only "requires the judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," but also lays the groundwork for forum shopping between state and federal courts. The Alabama Supreme Court itself brings this issue into sharp focus by its statement in *Ex Parte Jack D. Warren* that "the enforcement of predispute arbitration agreements, while approved in the federal court system . . . is specifically prohibited by Alabama Code (1975) §8-1-4(3)." ___ So.2d at ___ .

Nor is the threat of forum shopping illusory. In fact, one of the members of the ADAA and AIADA is currently involved in litigation in which the United States District Court for the Northern District of Alabama, Southern Division has stayed the civil action in favor of arbitration under the provisions of the FAA, refusing to follow *Ex Parte Jack D. Warren. See Terri O. Williams v. Dan Tucker Auto Sales, Inc.,* (CV-89-AR-1350-S) (copies of the Motion to Stay, Motion to Remand, and Order to Stay in this unreported case are set forth in the appendix to this brief). Thus, the enforceability of arbitration agreements in automobile sales contracts in Alabama will now turn on whether the litigants are in state or federal court. This is precisely the result Congress sought to avoid in enacting the FAA. *See e.g. Southland Corp. v. Keating,* 465 U.S. 1, 14-16 (1984); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 26, n. 34 (1983).

CONCLUSION

For the foregoing reasons, the Automobile Dealers Association of Alabama, Inc. and the Alabama Independent Automobile Dealers Association, Inc. respectfully request

that the Petition for Writ of Certiorari in this cause be granted. The ADAA and AIADA submit that the decision of the Court below should be summarily reversed on authority of *Perry v. Thomas*, 482 U.S. 483 (1987) and *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

Respectfully submitted,

ROBERT A. HUFFAKER
Counsel of Record

General Counsel
Automobile Dealers Association
of Alabama, Inc.
Post Office Box 270
Montgomery, Alabama 36195
Telephone: (205) 834-8480

APPENDIX

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

TERRI O. WILLIAMS,	)	
	)	
PLAINTIFF,	)	
	)	Civil Action No:
VS.	)	CV-89-AR-1350-S
	)	
DAN TUCKER AUTO SALES, INC. and GENE BOLTON,	)	
	)	
	)	
DEFENDANTS.	)	

MOTION TO STAY

Comes now Dan Tucker Auto Sales, Inc. and Gene Bolton and moves the Court to stay this action and require the plaintiff to submit her dispute to binding arbitration, pursuant to the provisions of 9 *USC* §1, et. seq., and according to the Commercial Rules of Arbitration of the American Arbitration Association.

In support hereof, your movants show as follows:

1. On or about April 15, 1989 the Plaintiff and the Defendant Dan Tucker Auto Sales, Inc. entered into a written agreement to arbitrate any dispute arising out of the transaction sued upon by the Plaintiff at bar. A copy of such agreement is attached hereto, incorporated herein by reference, and attached as Exhibit "A". At the time, the Defendant, Gene Bolton was an agent and employee of Dan Tucker Auto Sales, Inc., acting at all times within the line and scope of his employment for said dealership.[1]

[1]Your movants have highlighted the arbitration language in the attached Exhibit for the Court's convenience. The arbitration clause on the original document signed by the Plaintiff, is in bold red print on white paper, contrasted from the dark blue print of the remaining printed portion of the form.

2. The transaction between the parties involved commerce. The action commenced by the Plaintiff at bar asserts a federal cause of action (the Motor Vehicle Information and Costs Savings Act, 15 *USC* §1981) which was promulgated by Congress under its Commerce powers, and is based upon the Congressional finding that the sale of motor vehicles has an impact upon commerce.

3. Additionally, the Plaintiff previously submitted this dispute to binding arbitration and participated in the process of arbitration heretofore, but refused to complete said process having instead elected to file this action. Copies of documents from Plaintiff's counsel to the American Arbitration Association, showing such participation in arbitration are attached hereto, marked collectively as Exhibit "B" and incorporated herein by reference.

4. An arbitrator has been selected and the matter is scheduled for hearing in the fall of 1989, only having been delayed by Plaintiff's counsel's request to the Arbitrator to be permitted to conduct limited discovery.

WHEREFORE, and pursuant to 9 *USC* §1, et. seq., the Defendants move as aforesaid.

Respectfully submitted,

/s/ John Martin Galese

by John Martin Galese, Esq.

of Counsel:

GALESE AND MOORE
3058 Independence Drive
P.O. Box 75061
Birmingham, Alabama 35253
(205) 870-0663

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the above and foregoing document upon all counsel of record in this cause, U.S. Mail, postage prepaid, to their proper office addresses, on this the 4th day of August, 1989.

/s/ John Martin Galese

by John Martin Galese, Esq.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

TERRI O. WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
VS.	)	NUMBER
	)	CV 89-AR 1350S
DAN TUCKER AUTO SALES, INC. and GENE BOLTON,	)	
	)	
	)	
Defendants.	)	

MOTION TO REMAND

Comes now the Plaintiff by and through her attorney of record, and moves this Court to remand the above-referenced action to this Circuit Court of Jefferson County, and as grounds for said motion would submit the following:

1. Suit was filed in the above-referenced cause in Jefferson County Circuit Court, Alabama, on July 20, 1989.

2. Plaintiff has alleged in her Complaint, a copy of which is attached hereto and made a part hereof as Exhibit "A", various causes of action and theories of recovery, to wit: (a) an action under the Motor Vehicle Information and Costs Savings Act, 15 *USC* § 1981 et seq.; (b) an action for misrepresentation under the laws of the State of Alabama; (c) an action for fraud under the laws of the State of Alabama; and (d) an action for outrageous conduct under the laws of the State of Alabama.

3. The only basis for the removal of this action from Jefferson County Circuit Court to the Northern District of Alabama, Southern Division, is the allegation by defense counsel that said action is brought under the Motor Vehicle

Information and Costs Savings Act. Under said act, in 15 *USC* § 1989 (b), it is plainly set out: "An action to enforce any liability created under Subsection (a) of this section, may be brought in a United States District Court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises."

4. The Defendants have, on the same date that the Petition for Removal was filed, filed a Motion to Stay any and all legal proceedings brought by Plaintiff against Defendant on the basis of an arbitration agreement proportedly entered into between Plaintiff and Defendant at the time of the purchase of the automobile made the basis of the dispute. Plaintiff would submit that the Alabama Supreme Court, in the case of *Ex Parte Warren* ___ So. 2d ___ (July 7, 1989), stated, "The enforcement of predispute arbitration agreements, while approved in the Federal Court system . . . is specifically prohibited by Alabama Code 1975, § 8-1-41(3)."

WHEREFORE, Terri O. Williams, moves the Court to remand this case to Jefferson County Circuit Court, on the basis of 15 *USC* § 1989 and Alabama state law.

/s/ Michael L. McKerley

Micheal L. McKerley

PRITCHARD, McCALL & JONES
800 Financial Center
505 North 20th Street
Birmingham, Alabama 35203-2605

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing pleading upon all counsel of record by placing a copy of same in the United States mail, first-class postage prepaid, this 11th day of August, 1989, as follows:

John Martin Galese
Galese and Moore
3058 Independence Drive
Post Office Box 75061
Birmingham, Alabama 35253

/s/ Michael L. McKerley

OF COUNSEL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

TERRI O. WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
VS.	)	NO.:
	)	89-AR-13508S
DAN TUCKER AUTO SALES, INC.	)	
ET AL.	)	
	)	
Defendants.	)	

ORDER

The court has for consideration the motion of plaintiff, Terri O. Williams, to remand the above-entitled cause to the Circuit Court of Jefferson County, and the motion of defendants, Dan Tucker Auto Sales, Inc., and Gene Bolton, to stay the action while requiring plaintiff to proceed with binding arbitration of the issues she would present in this cause.

The motion to remand is not well taken and is DENIED. The motion for a stay is well taken and is GRANTED. There shall be no discovery or other activity in this court pending resolution of the issues by and between the parties by the arbitrator selected in accordance with the arbitration agreement attached as Exhibit "A" to defendants' motion to stay. Within ten (10) days after the arbitrator's decision, a copy of that decision shall be filed with the Clerk in order that this action can thereupon be mooted or otherwise appropriately disposed of.

DONE this 16th day of August, 1989.

/s/ William M. Acker, Jr.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE